

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL
MORTGAGE BACKED SECURITIES
LITIGATION

This Document Relates to: ALL CASES

Master Case No. 2:09-cv-00037-MJP

**PLAINTIFFS' OPPOSITION TO
DEFENDANTS' MOTION TO AMEND
SCHEDULING ORDER**

**NOTED ON MOTION CALENDAR:
August 5, 2011**

I. INTRODUCTION

Lead Plaintiffs Policemen's Annuity & Benefit Fund of the City of Chicago ("Chicago PABF"), Doral Bank of Puerto Rico ("Doral Bank") and Plaintiff Boilermakers National Annuity Trust (collectively, "Plaintiffs") respectfully submit their response to the motion filed by Defendants on July 28, 2011 ("Def. Mot.," Dkt. No. 287) for an order amending the October 29, 2010 scheduling order ("Scheduling Order," Dkt. No. 207).

II. FACTS

This litigation commenced in January 2009 - more than two and a half years ago. Document discovery began a little less than a year later and was scheduled to be substantially complete on July 29, 2011. However, on the eve of their production deadline, due in large part to delays caused by their own lack of diligence, Defendants now seek a two-month

1 extension of that production deadline. *See* Proposed Amended Scheduling Order (“Proposed
2 Order”), Dkt. No. 289 at 1. Defendants do not tell this Court that they failed to locate and
3 begin the process of identifying WaMu Capital Corporation (“WCC”) documents until
4 recently. Declaration of Joseph P. Guglielmo (“Guglielmo Decl.”) at ¶4 (On a July 19
5 telephone call, Defendants disclosed that they had not yet even determined how to locate
6 responsive documents on WCC’s main shared computer drive.). Defendants also do not tell
7 the Court that their failure to locate and identify responsive documents from WCC and other
8 sources will deprive Plaintiffs of needed time to review the materials produced belatedly and
9 will hinder Plaintiffs’ ability to take depositions of key witnesses.

10 Defendants seek an additional two months to produce documents with no
11 consequences to themselves for their delay, but with significant consequences to Plaintiffs.
12 Plaintiffs need time to conduct a meaningful review of Defendants’ production before
13 Plaintiffs can begin taking depositions. A two-month document production delay will
14 prohibit Plaintiffs from taking any substantive depositions until October – significantly
15 shortening their time to conduct discovery and leaving them just three months to take all of
16 their fact depositions. Such a delay will shorten other time periods, all to Plaintiffs’
17 detriment. Defendants have failed to show “good cause” for such an extension, especially in
18 light of their failure to diligently proceed with discovery. Fed. R. Civ. P. 16(b). Of course,
19 Plaintiffs recognize that Defendants do apparently need more time to produce the documents
20 that Plaintiffs require to adequately prosecute this action; however, Plaintiffs believe that
21 Defendants should be required to complete their document production by August 12 and that
22 such delay must not come without consequences.

23 Defendants, through their instant motion, gallingly seek to *benefit* from their
24 unreasonable delay by shortening Plaintiffs’ time to review documents, depose witnesses and
25 prepare critical arguments and reports. Defendants’ motion, which was filed on the eve of
26 the deadline by which their document production was to be completed (which has now
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1 passed), seeks an **additional 63 days** for their document production. While this deadline
2 benefits Defendants, it and Defendants' other proposed revised deadlines penalize Plaintiffs.
3 Specifically, Defendants propose postponing the close of fact discovery from December 1
4 until only January 17, 2012, effectively **shortening Plaintiffs' time to conduct deposition**
5 **discovery by more than a month** given the inherent difficulties in scheduling during the
6 winter holidays. Similarly, Defendants propose extending the deadline for amending
7 pleadings by *only 38 days*, effectively **reducing Plaintiffs' time to amend their pleadings**
8 **by nearly one month**. Proposed Order at 2. Defendants propose extending the deadline for
9 exchanging merit expert reports by only 24 days, effectively **reducing Plaintiffs' time for**
10 **preparation of merit expert reports for exchange by 39 days**. *See id.* Defendants propose
11 extending the deadline for close of expert discovery by only 18 days, thereby effectively
12 **reducing Plaintiffs' time for expert discovery by 45 days**. *See id.* Defendants propose
13 extending the deadline for expert discovery motions to be filed by only 18 days, effectively
14 **reducing Plaintiffs' time for preparation of this motion by 45 days**. *See id.* Finally,
15 Defendants propose no change at all for the deadline for Plaintiffs' response to any summary
16 judgment motion filed by Defendants, **reducing Plaintiffs' time to prepare their case to**
17 **respond to any such motion by 63 days – or two months**. *See id.*

18 Plaintiffs' principal allegation in this case is that Defendants – Washington Mutual
19 Bank ("WMB"), Washington Mutual Asset Acceptance Corporation and WCC, among others
20 – misrepresented the underwriting standards followed in originating the mortgage loans
21 collateralizing certain WaMu Mortgage-Backed Securities. Despite the fact that Plaintiffs
22 served discovery requests in October 2010, giving Defendants approximately eight months to
23 produce documents, Defendants have failed to produce numerous documents responsive to
24 Plaintiffs' discovery requests, and repeatedly postponed Plaintiffs' efforts to conduct
25 discovery. Indeed, although on March 24, 2011, Plaintiffs served a 30(b)(6) deposition
26 notice concerning the identification of documents and the process by which Defendants
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1 securitized the loans and ultimately sold the Certificates to Plaintiffs and other class
2 members, Defendants asked to reschedule the deposition numerous times due to their delays
3 in producing their documents. It is apparent from Defendants' conduct concerning the
4 production of responsive documents that they seek only to stall Plaintiffs' prosecution of this
5 action.

6 **III. LEGAL STANDARD**

7 Under Rule 16(b), a scheduling order set by the Court "may be modified only for
8 *good cause* and with the judge's consent." Fed. R. Civ. P. 16(b(4); *Interscope Records v.*
9 *Leadbetter*, No. C05-1149, 2007 WL 1217705, at *5 (W.D.Wash. Apr. 23, 2007). "To hold
10 otherwise undermines the whole thrust and purpose of scheduling orders." *Eiden v. Home*
11 *Depot USA, Inc.*, No. C04-977, 2006 WL 1490418, at *6 (E.D. Cal. May 26, 2006) (citing
12 *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604 (9th Cir.1992)). To determine whether
13 the movant has demonstrated "good cause" under 16(b), the Court primarily considers the
14 diligence of the party seeking the amendment. *Schultz v. Olympic Medical Center*, No. C07-
15 5377, 2008 WL 3977523, at *5 (W.D.Wash. Aug 22, 2008) (citing *Johnson*, at 975 F.2d at
16 609.) While the focus of the inquiry is upon the movant's reasons for seeking modification,
17 the existence or degree of prejudice to the party opposing the modification might supply
18 additional reasons to deny a motion. *Id.*; *see also Bush v. Pioneer Human Services*, No. C09-
19 0518, 2010 WL 324432, at *3 (W.D. Wash. Jan. 21, 2010).

20 **IV. ARGUMENT**

21 Defendants' proposed amendment is unjustified.¹ Indeed, although Defendants seek a
22 two-month extension, they have not even identified the universe of additional documents
23 they intend to produce in this time frame. Furthermore, they have not demonstrated the
24 requisite diligence in locating and producing documents responsive to Plaintiffs' requests.

25 _____
26 ¹ Plaintiffs are somewhat sympathetic to JPMorgan Chase's ("Chase") issues as a non-party and the volumes of
27 material it is preparing for production, and previously offered to discuss a separate extension with Chase.
Guglielmo Decl., ¶7.

1 Indeed, many of the proffered reasons for Defendant's inability to produce documents in a
2 timely manner – "the effort requires third-party vendors" (Def. Mot. at 4), the "absence of
3 former WCC employees knowledgeable about the location and nature of WCC's documents"
4 (Def. Mot. at 5), and that JPMorgan had no prior involvement with WMB (*id.*) – were known
5 by Defendants when they negotiated the dates in the Scheduling Order with Plaintiffs.
6 Defendants do not explain why they never previously searched the WCC documents they
7 now request a two-month extension to produce. Moreover, the fact that Defendants have
8 only recently discovered an additional WCC data set, that "may include responsive
9 documents" (*see* Dkt. No. 288 at ¶7), does not in any way explain why document production
10 could not have been *substantially complete* by July 29, 2011.²

11 Aside from Defendants' failure to show good cause for amendment, Plaintiffs
12 respectfully submit that the Court should consider the prejudice that would inure on Plaintiffs
13 and the putative class -- or conversely the tactical advantage enjoyed by Defendants by way
14 of their lack of diligence -- should the Court enter Defendants' proposed amended order. *See*
15 *Bush*, 2010 WL 324432, at *4. As discussed *supra*, Plaintiffs would lose months in informed
16 preparation for substantive briefs and reports. They will face a massive "document dump"
17 with very little time to review the additional documents. The prejudice to Plaintiffs is
18 exacerbated by Defendants' last minute proposed amended scheduling order, which was the
19 first time Plaintiffs learned that Defendants would not produce the documents Plaintiffs seek
20 until September 30, 2011. Indeed, it was not until a July 19 meet and confer call that
21 Defendants suggested they would need additional time to complete document production,
22 and even then suggested that it was only a matter of a few weeks delay. Guglielmo Decl., ¶¶
23 4-5. During that call, Plaintiffs told Defendants that they were reluctant to consent to any

24 ² Defendants tout the number of documents already produced to Plaintiffs. While JPMorgan, a non-party, has
25 indeed produced over 1.5 million documents, the majority of these documents were previously produced to the
26 Senate Permanent Subcommittee on Investigations ("PSI") and thus required minimal effort or diligence by
27 JPMorgan or Defendants. Defendants themselves have timely produced less than 2 million pages of documents
(and in violation of the current scheduling order, an additional 700,000 pages of documents on August 1).
Guglielmo Decl. ¶13.

1 extension and that Defendants should file a motion at that time to seek an extension.
2 However, Defendants waited until the day before the deadline to propose a modified
3 schedule of the form they propose in their motion. *See* Guglielmo Decl., Ex. A (July 28,
4 2011 11:47 ET email from J. Pernick to J. Guglielmo & J. Devore). Plaintiffs reluctantly
5 offered a two-week extension with no other modifications to the scheduling order to attempt
6 to keep the case on schedule, *id.*, Ex. B (July 28, 2011 email from J. Devore to J. Pernick et
7 al.), but Defendants persisted in promoting their self-serving modified schedule.

8 Notably, other than their failure to timely locate the responsive materials, Defendants
9 offer no explanation why they could not simply retain additional technical consultants and
10 attorneys to expedite the review and production now that they have located the records.
11 Given that the Confidentiality Order entered in this Action contains a “claw back” provision,
12 Defendants could immediately turn over the documents they have located via the use of
13 search terms without conducting a page-by-page review of the production for privileged
14 communications, thereby saving a tremendous amount of time associated with the production
15 of the WCC documents.

16 As discussed above, Plaintiffs will undoubtedly be prejudiced by Defendants’
17 proposed amendment, and Defendants have failed to demonstrate diligence of any substance
18 or the good cause necessary to merit extension of the dates in the case scheduling order.
19 While Plaintiffs believe that the Court should deny Defendants’ motion in its entirety,
20 Plaintiffs see no reason why Defendants cannot complete their production by August 12, a
21 date Plaintiffs had previously offered Defendants, with no further modifications to the
22 schedule. If the Court is considering any additional modifications to the schedule, in
23 fairness, they should provide Plaintiffs with at-least equal if not greater time to complete any
24 tasks they were already scheduled to undertake, and should shorten the time allowed for
25 Defendants’ other tasks to avoid postponing the action any more than already necessary.

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V. CONCLUSION

Plaintiffs respectfully request that Defendants' motion to amend the Court's Scheduling Order be denied and that Defendants be required to complete their production of all documents by August 12, 2011. Alternatively, should the Court be inclined to extend the schedule, any extension should be applied in a way so as not to benefit defendants nor prejudice plaintiffs.

Dated: August 3, 2011

Respectfully submitted,

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